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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 545

CHARLES EDWARD ANDERSON BERRY,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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OCTOBER TERM, 1960.

No. .....

CHARLES EDWARD ANDERSON BERRY,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on October 28, 1960.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, p. 11.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 28, 1960 (Appendix, infra, p. 15). The jurisdiction of this Court is invoked under 28 U. S. C. A., 1254 (1).

QUESTIONS PRESENTED.

(1) Whether a criminal violation under Section 242 Title 18, U. S. Code (Mann Act) is committed when pe tioner transported a female from one state to another f the expressed and unquestioned purpose of providing h with lawful employment at the destination, but during t journey and at the destination engaged in acts of sexu intercourse with such female.

(2) Whether the necessary immoral purpose required t sustain a "Mann Act" violation under Section 2421, Ti 18, U. S. Code, can be proven by retroactively applying a intent inferred from acts occurring during the interst journey, particularly when the government's evidenc manifested an innocent purpose and intent as the origin motivation for such journey.

STATUTE INVOLVED.

United States Code, Title 18, Section 2421:

> "Whoever knowingly transports in interstate foreign commerce, or in the District of Columbia or i any Territory or Possession of the United States, a woman or girl for the purpose of prostitution or d bauchery, or for any other immoral purpose, or wi the intent and purpose to induce, entice or comp such woman or girl to become a prostitute or to gi herself up to debauchery, or to engage in any oth immoral practice;
>
> . . . . . .
>
> Shall be fined not more than $5,000 or imprison not more than five years, or both."

STATEMENT

The petitioner was convicted on an indictment charging him with knowingly transporting a female from El Paso, Texas, to St. Louis, Missouri, for purposes of debauchery and other immoral practices, in violation of Title 18, United States Code, Section 2421. Petitioner was sentenced to imprisonment for five years and a fine of $5,000.00, the maximum authorized punishment (R. 439). On appeal, the United States Court of Appeals for the Eighth Circuit vacated the judgment because of prejudicial error at the trial (based on conduct and remarks of the trial judge) and remanded the case for a new trial, specifically denying petitioner's request, urged both at the trial and on appeal, for a directed verdict and judgment of acquittal (Appendix, infra, p. 12).

Petitioner is a professional entertainer, having made numerous recordings, radio and television appearances, several movies, and many personal appearance tours (R. 216-217). According to the government's evidence, it was on such a tour that he met the female in question (who lived in El Paso, Texas) in a bar in Juarez, Mexico, located across the river from El Paso, on December 1, 1959 (R. 6-7). This female, the chief prosecuting witness, testified that her name was Janice Norine Escalanti, that she was of Indian extraction, and was fourteen and one-half years old (R. 5), but admitted that she had at all times represented her age to petitioner and others as twenty-one years (R. 45-46).

The government evidence showed that this female accompanied petitioner and his three band members around Juarez, showing them the sights, then back to El Paso several hours after they met, since they were to give a performance in the El Paso Coliseum that night (R. 17, 50). After leaving the band members off, petitioner drove her

to her home, stopping en route at place where she was to pick up her key (R. 11-12). At this time, the two had a conversation, during which petitioner offered her a job at his night club in St. Louis, Mo., as a hat check girl (R. 12). She indicated she would like the job, but had no way of getting to St. Louis, whereupon Petitioner suggested that she might work with him and the band on the remainder of their current tour, selling photographs at each engagement, and thereby eventually arrive in St. Louis (R. 61). The girl testified unequivocally that the sole reason for the trip discussed between Petitioner and herself was to obtain this employment in St. Louis, and this was her only reason for going (R. 62). She had also told Petitioner that she had, in the past, been a prostitute, and they both agreed that this might be a good way for her to "straighten" out (R. 62).

Following this conversation, Petitioner drove the girl home, then back to the Coliseum, where she worked during the performance selling photographs (R. 13). She then accompanied Petitioner and his three band members, in Petitioner's automobile, on the remainder of the tour which took them to Tucson, Arizona (R. 14), Phoenix, Arizona (R. 24), Santa Fe, New Mexico (R. 25), Denver, Colorado (R. 27), Pueblo, Colorado (R. 31) and back to St. Louis, Mo., where she arrived on December 7th or 8th (R. 34). At each performance, except Denver and Pueblo, she sold photographs just as in El Paso (R. 2[illegible] 73, 27, 30, 31). Furthermore, after arrival in St. Louis the girl did in fact work regularly at Petitioner's night club as a hat check girl and sometimes as a ticket taker (R. 36, 37, 89). During this period, she lived with Francine Gillium, Petitioner's secretary, and occupied her own room (R. 88). After approximately two weeks in St. Louis, during which time Petitioner had reprimanded her on various occasions for improperly handling her duties at the club (R. 90, 91, 92, 93), Petitioner asked her to leave

(R. 39). He drove her to the bus station, purchased a ticket for her to El Paso, and gave her $5.00 for meals en route (R. 40). She did not board the bus, but remained in St. Louis another week and eventually caused Petitioner to be arrested, at which time she revealed for the first time that she was a minor (R. 45-46).

The only evidence offered to show any immoral purpose for the trip was testimony of this female that Petitioner had intercourse with her during the trip at the hotel rooms in Tucson and Denver (R. 18 and 30), which they occupied jointly, and in the back seat of the moving vehicle during the journey between Phoenix and Santa Fe (R. 26) and between Santa Fe and Denver (R. 80-81). She also testified that back in St. Louis, Petitioner had intercourse with her almost every night in her room, after the club had closed (R. 38, 39). The government offered no other evidence to corroborate any of these acts of intercourse, all of which were specifically denied by Petitioner (R. 231, 245, 280). The members of the band who were on the tour also failed to corroborate, in any manner, her testimony of immoral conduct (R. 166, 167, 194).

Petitioner's motions for directed verdict of acquittal were filed and denied at the close of the government's case (R. 269) and at the close of the entire case (R. 396). This particular action of the trial court was affirmed by the Court of Appeals (Appendix, infra, p. 12) which remanded the case for retrial on other grounds.

REASONS FOR GRANTING THE WRIT.

1. The decision and opinion of the court below manifests a failure to observe and follow the principles announced in **Mortensen v. United States**, 322 U. S. 369, and is in clear conflict with that authority.

The **Mortensen** decision is unquestionably this Court's most specific interpretation of the nature of the intent

element required in a violation of Section 2421. That case, of course, involved a vacation trip from Grand Island, Nebraska, to Salt Lake City, Utah, on which defendants (who operated a brothel) were accompanied by two prostitutes in their employ. No immoral purpose for the over-all trip itself was claimed, but it was contended that the return trip to Nebraska where the girls were to resume their immoral activities was sufficient to establish a Mann Act violation. This theory was rejected and the conviction of defendants reviewed in an opinion by Mr. Justice Murphy, who noted that the only activity outlawed by the act was "the use of interstate commerce as a **calculated** means for effectuating sexual immorality" (emphasis added). Applying this criterion, the opinion further observed that since the overall purpose of the journey was for innocent vacationing, the return portion of the trip could not be arbitrarily split off and stigmatized with the immoral purpose of getting the prostitutes back to their lewd practices. Furthermore, while the **Mortensen** decision was rendered by a closely divided court, it was cited with approval only recently in **Hawkins v. United States**, 358 U. S. 74, which reversed, without dissent, a Mann Act conviction and placed particular emphasis upon the language in **Mortensen** relative to purpose and intent.

The decision below, however, exhibits a sharp conflict with the **Mortensen** opinion on this issue. In discussing the sufficiency of the evidence, the Court of Appeals makes no reference to the fact that a legitimate purpose for the over-all trip was shown, but merely comments that

> "The evidence of the Government with respect to the relations existing between Berry and the girl on the trip from El Paso, Texas, to St. Louis, Missouri, and after their arrival in St. Louis, amply justified an inference that his initial intent in transporting her

was to have her engage in immoral relations with him" (Appendix, infra, p. 12).

A basic infirmity in this reasoning, of course, is that it accepts a mere "intent" (to have the female engage in immoralities) as sufficient to complete the crime. However, as the **Mortensen** opinion points out, such an intent alone is insufficient—it must be the "dominant motive of such interstate movement". Certainly the Mortensens "intended" to have the girls engage in prostitution when they returned to Nebraska, but this intention was not the purpose for which the trip was made, hence no federal crime was committed. Similarly, in the instant case, regardless of whether Petitioner intended to engage in immoral acts with the female, no violation is shown unless that intention was the "dominant motive" of the journey. This purpose-intent distinction, carefully defined in **Mortensen v. United States**, was plainly disregarded in the instant case—a fact further evidenced by the failure of the opinion below to even mention the legitimate purpose for the trip which the evidence disclosed. In other words, contrary to the **Mortensen** decision, the Court of Appeals appears determined to uphold a conviction regardless of the purpose of the trip, so long as an intent to engage in immoral conduct is shown.

Furthermore, the decision below, as illustrated by the foregoing excerpt from the opinion, upholds the conviction of Petitioner by giving a retroactive effect to an intention inferred from immoral conduct after the trip was begun. Petitioner departed from El Paso, with St. Louis as the ultimate destination, taking the girl as a passenger pursuant to an expressed agreement between them that she would be employed as a hat check girl in his St. Louis club. This the Government's evidence showed without contradiction. It also showed that such employment was in fact given to the girl upon arrival in St. Louis. Only

acts of intercourse, occurring after the trip had begun, are offered to prove unlawful purpose. The Court below held that such immoral activities alone justify the inference of an unlawful purpose at the **start** of the trip, a viewpoint directly opposite to the holding in **Mortensen v. United States** on this very point, to-wit:

> "The fact that the two girls actually resumed their immoral practices after their return to Grand Island does not, standing alone, operate to inject a retroactive illegal purpose into the return trip to Grand Island."
>
> 322 U. S. at p. 375.

In the instant case, just as in **Mortensen**, immoral practices, standing alone, are attempted to be used to raise inferences **retroactively** which might impart an illegal purpose to the otherwise lawful journey.

But perhaps the most obvious conflict with the **Mortensen** decision occurs in regard to the principle holding of that case—the unity, or unseverability, of the interstate trip in determining its purpose. In this regard, that opinion stated:

> "The return journey under the circumstances of this case cannot be considered apart from its integral relation with the innocent round trip as a whole. There is no evidence of any change in purpose of the trip during its course. **If innocent when it began it remained so until it ended.**" (Emphasis added.)
>
> 322 U. S. at p. 375.

The opinion then cited with approval the observation in **Hansen v. Haff**, 291 U. S. 563 at p. 564:

> "People not of good moral character, like others, travel from place to place and change their residence. But to say that because they indulge in illegal or

immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance."

This very basic interpretation of the Mann Act the decision below fails to follow. The over-all trip on which the female was transported was clearly from El Paso, Texas, to St. Louis, Missouri. The basic purpose or inducement for this trip, conceived and expressed before the journey began, was the innocent employment of the female in St. Louis (R. 61-62). In fact, this purpose was fulfilled and she was actually employed in St. Louis, as per the El Paso agreement (R. 36-37). Nevertheless, the Court below looks only to the evidence of sexual relations, and finds it sufficient to justify inferences which impute an unlawful purpose to the interstate transportation, ignoring the innocent over-all motive which was shown without contradiction.

It is, therefore, apparent that the decision below is in direct opposition to **Mortensen v. United States** on at least three vital issues:

1. A mere intent to have the female engage in immoral activities is held to be sufficient, without regard to the dominant purpose or motive of the trip.

2. Acts of immoral conduct occurring after the trip began, standing alone and without any other evidence of immoral purpose, are used to inject a retroactive illegal purpose into the trip.

3. The journey from El Paso to St. Louis is not treated as a single over-all trip with a dominant purpose. Instead, an initial unlawful "intent" is generally inferred from later immoral conduct, while an expressed (and fulfilled) innocent purpose for the total trip is completely ignored.

Petitioner submits that a review of the decision below is most warranted since it involves an unusual extension

of the Mann Act to a situation well beyond the legislative intent. The decisions cited in the opinion below to justify the courts conclusions all involved transportation of practicing prostitutes by their business agents—clearly situations in which purpose and motive are easily inferred. But nowhere did the court below deal with the effect of the evidence of an innocent purpose, which was here present. Instead, it ruled that repeated acts of intercourse can in fact convert an originally innocent interstate journey into a Mann Act violation. Such a broadened application of Section 2421 reverses prior appellate treatment of this issue [as in **Sloan v. United States**, 287 Fed. 9 (C. A. 8) and **Yoder v. United States**, 80 F. 2d 668 (C. A. 7)], exceeds the clear legislative intent, and certainly conflicts directly with the principles and interpretations of **Mortensen v. United States**, 322 U. S. 369. A review by the Supreme Court is now necessary to the orderly administration of criminal justice. As the Mann Act is sought to be applied by federal prosecutive authorities more and more to cases of non-commercial immorality (as in the instant case), the issue in this case becomes more pervasive and recurring. Its resolution by this court will determine the role to be played by the Mann Act as a deterrent to private (as contrasted with commercial) immorality.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari in the above cause should be granted.

Respectfully submitted.

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St. Louis, Missouri,
Attorney for Petitioner.

OPINION.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16,446.

Charles Edward Anderson Berry, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[October 28, 1960.]

Before Sanborn, Woodrough and Matthes, Circuit Judges.

Per Curiam.

Charles Edward Anderson Berry, thirty-three years of age and a married man, is a musician, entertainer, actor, song writer, and stockholder in Chuck Berry Music Corporation, which owns a night club in St. Louis, Missouri, known as "Chuck Berry's Club Bandstand". Berry is a Negro. He was, on December 23, 1959, charged by indictment with having knowingly transported in interstate commerce from El Paso, Texas, to St. Louis, Missouri, a girl known as Janice Norine Escalanti, with the intent to induce her to engage in immoral practices; a violation of 18 U. S. C. § 2421. To the indictment, Berry entered a plea of not guilty. He was tried to a jury, found guilty, and

on March 11, 1960, sentenced to five years' imprisonment and to pay a fine of $5,000. He has appealed.

On Berry's behalf it is contended that his motion for a directed verdict of acquittal, made at the close of the evidence, should have been granted on the ground of the insufficiency of the evidence to show the intent necessary to make his transportation of the girl a criminal offense. It is also contended that he did not have a fair trial because of "the hostile and prejudicial conduct and remarks of the trial court," and that the trial judge erred in certain rulings on evidence and in his instructions to the jury.

We think it would serve no useful purpose to discuss this case in detail. If there is to be a retrial, the rulings on evidence of which complaint is made are unlikely to recur, and we doubt that any of them affected the defendant's substantial rights. See **Heglin v. United States**, 8 Cir., 27 F. 2d 310, 313. The charge of the trial court as a whole was, in our opinion, adequate, fair and accurate. Berry was not entitled to a directed verdict of acquittal. There was ample circumstantial evidence of his intent, when he picked up the girl in El Paso, to make the issue of his guilt one for the jury. See and compare: **Shama v. United States**, 8 Cir., 94 F. 2d 1, 4 and cases cited; **Dunn v. United States**, 10 Cir., 190 F. 2d 496, 498; **United States v. Mathison**, 7 Cir., 239 F. 2d 358, 360-361; **Garner v. United States**, 8 Cir., 277 F. 2d 242, 245. What a man does is often more indicative of his intent than what he says. Intent, like any other fact, may be circumstantially proved. "Triers of fact are constantly called upon to determine the intent with which a person acted." **Commissioner v. Culbertson**, 337 U. S. 733, 743. The evidence of the Government with respect to the relations existing between Berry and the girl on the trip from El Paso, Texas, to St. Louis, Missouri, and after their arrival in St. Louis, amply justified an inference that his initial intent in transport-

ing her was to have her engage in immoral relations with him.

What has given us concern is whether the attitude, conduct and remarks of the trial judge which are complained of, must be held to have made the trial unfair. This Court has not been unduly critical of sharp remarks made by a trial judge to counsel for a defendant with respect to rulings on evidence. In **Goldstein v. United States**, 8 Cir., 63 F. 2d 609, 613, it was contended that misconduct of the trial judge required a reversal of a conviction. This Court, after quoting what was said in **Sutherland v. United States**, 8 Cir., 19 F. 2d 202, 216, about a fair trial meaning "a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm," went on to say (page 613 of 63 F. 2d):

> "It is not always possible during the trial of a hotly contested case for a judge, however impartial he may be, to maintain in the courtroom that atmosphere of complete judicial calm which is so much to be desired. We must not overlook the fact that the human element cannot be entirely eliminated from the trial of lawsuits. While counsel owe to the court, because of the position which he occupies, the utmost deference and respect, and while the court owes to them an equal obligation of courtesy and patience and consideration, nevertheless sharp differences of opinion do arise in the heat of trial and things are said which were better left unsaid. * * * An appellate court should be slow to reverse a case for the alleged misconduct of the trial court, unless it appears that the conduct complained of was intended or calculated to disparage the defendant in the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits."

No matter how objectionable a character Berry may have been or how strong the evidence against him, he was

unquestionably entitled to a full and fair trial. It seems safe to say that ordinarily a trial judge who, in the presence of the jury, makes remarks reflecting upon a defendant's race or from which an implication can be drawn that racial considerations may have some bearing upon the issue of guilt or innocence, has rendered the trial unfair. Compare, **Skuy v. United States**, 8 Cir., 261 Fed. 316, 319-320, in which a new trial was ordered because counsel for the government made derogatory remarks about witnesses of the Jewish race.

We find it unnecessary in the instant case to set out in this opinion the remarks complained of. Many of them, viewed in isolation, would probably not rise to the dignity of reversible error. Each of us has carefully reviewed and considered the record as a whole, and each of us has reluctantly come to the conclusion that the trial accorded Berry was unfair because of the attitude of the trial judge toward him, as evidenced by remarks made during the course of the trial.

In fairness to the trial judge, it should be said that much occurred to try his patience. The record shows that he had difficulty in hearing witnesses; that he apparently was in physical discomfort much of the time; that the trial dragged; that he was unable to see eye-to-eye with counsel in their conduct of the trial; that there was convincing evidence that Berry's treatment of the girl named in the indictment—who was a fourteen-year-old Apache Indian who had become a prostitute—was inexcusable; and that his testimony about his intention in transporting her in his automobile from El Paso to St. Louis being to make an honest woman of her, had its irritating aspects.

Nevertheless, as we have said, Berry was entitled to a fair trial, and we are convinced that the "conduct [of the trial court] complained of was intended or calculated to disparage the defendant in the eyes of the jury and to

prevent the jury from exercising an impartial judgment upon the merits" within the meaning of **Goldstein v. United States**, supra, page 613 of 63 F. 2d.

The judgment appealed from is vacated, and the case is remanded to the District Court for a new trial before a judge to be designated by the Chief Judge of that court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT.

United States Court of Appeals
For the Eighth Circuit.

No. 16,446. September Term, 1960.

Charles Edward Anderson Berry,
Appellant,

vs.

United States of America.

Appeal from the United States District Court
for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, vacated.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for a new trial before a judge to be designated by the Chief Judge of that Court.

October 28th, 1960.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLES EDWARD ANDERSON BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
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CITATION

Case:

Dunn v. *United States*, 190 F. 2d 496 3

In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 545

CHARLES EDWARD ANDERSON BERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 11-15) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 28, 1960. The petition for a writ of certiorari was filed November 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals should have directed a judgment of acquittal on the evidence instead of remanding for a new trial.

STATEMENT

The petitioner was convicted in the United States District Court for the Eastern District of Missouri of having transported a girl from El Paso, Texas, to St. Louis, Missouri, for immoral purposes. On appeal, the Court of Appeals reversed the judgment of conviction and remanded the case for a new trial on the ground that the trial was unfair.[1] In its opinion, the court noted that the evidence "amply justified an inference" that the petitioner's initial intent in transporting the girl (who was 14 years old at the time, although she had told petitioner she was 21) was to have her engage in immoral relations with him. The petitioner challenges this ruling and seeks to have this Court decide that he should have been granted a verdict of acquittal.

ARGUMENT

There is no occasion for this Court to review the interlocutory judgment of the Court of Appeals remanding the case for a new trial. There is no dispute as to the applicable principles; the question is entirely one of the inferences to be drawn from the evidence. If the petitioner's purpose in transporting the girl from Texas to Missouri was primarily to give her employment, the fact that he later decided to have sexual relations with her would not render him guilty; if his initial purpose was to have sexual relations with her, and the offer of employment was incidental to the means of making such sexual relations possible,

[1] The government in its brief in the court below had conceded that the jury might have been prejudiced against the petitioner by allusions of the trial judge to his race. The Court of Appeals agreed with this concession.

the petitioner was guilty of a federal offense. This was properly a jury question in this case. The evidence in this case was that, after meeting the girl in El Paso, the petitioner asked her to work for him (R. 12); that she sold pictures for him that night and then they left for Tucson with his band, arriving about 9:30 in the morning (R. 13-15). The petitioner had sexual relations with the girl that morning (R. 18), throughout the trip back to St. Louis, and after they returned from St. Louis (R. 23-24, 26-27, 29-30, 37-38).[2] This evidence was sufficient to justify submission to the jury of the issue of the petitioner's intent when he transported the girl. *Dunn* v. *United States*, 190 F. 2d 496 (C.A. 10), and cases cited.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

DECEMBER, 1963.

[2] Contrary to statements in the petitioner's brief, there was corroborating evidence in the form of testimony that the petitioner and the girl occupied the same room in Tucson (R. 128-131, 141-142) and in Denver (R. 146, 171-172).